80-1770

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CASE NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RALPH D. TURLINGTON, individually and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA, DEPARTMENT OF EDUCATION, et al.,

Petitioners,

v.

S-1, a minor, by and through his mother and next friend, P-1, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

JAMES D. LITTLE
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The Petitioners seek a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

1. Did the court of appeals misconstrue this Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and fail to give credence to the principles recognized therein when it held that the decision does not apply to this case because this case does not involve physical qualifications for admission to a professional school?

2. Did the court of appeals err in holding that "the complete cessation

of educational services during an expulsion period" is prohibited by the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401, et seq. (1976), and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1976), and their implementing regulations, 45 C.F.R. Parts 84 and 121a?

3. Did the court of appeals err in holding that an expulsion is a change in educational placement thereby invoking (to the exclusion of normal disciplinary procedures) the procedural protection of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1415 (1976), and Section 504 of the Rehabilitation

Act of 1973, as amended, 29 U.S.C. §794 (1976), and their implementing regulations, 45 C.F.R. Parts 84 and 121a?

4. Where state law provides that expulsion is a termination of a right to an education; where there is no proof that a student was in a federal program; where the Education for All Handicapped Children Act of 1975 was not applicable at the time of an expulsion of a handicapped student, but became applicable during the expulsion; where Section 504 of the Rehabilitation Act of 1973, as amended, was in effect at the time of the expulsion; did the court of appeals err in holding that even though the act, or conduct, which

precipitates the expulsion process is not caused by the student's handicap, the student must be provided an educational opportunity?

5. Did the court of appeals err in holding that a school is required to provide an educational program for an expelled student when the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401, et seq. (1976), 45 C.F.R. §121a, becomes applicable to the school system during the expulsion?

PARTIES

Petitioners (State Defendants):

RALPH D. TURLINGTON, individually, and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA, DEPARTMENT OF EDUCATION; and ROBERT GRAHAM, GEORGE FIRESTONE, JIM SMITH, RALPH TURLINGTON, BILL GUNTER, GERALD LEWIS AND DOYLE CONNER, individually, and in their official capacities as members of the STATE BOARD OF EDUCATION OF FLORIDA; and CAREY E. FERRELL, JR., individually, and in his official capacity as DIRECTOR, DIVISION OF PUBLIC SCHOOLS, STATE OF FLORIDA, DEPARTMENT OF EDUCATION; and DR. LANDIS STETLER, individually, and in his official capacity as CHIEF OF BUREAU

OF EDUCATION FOR EXCEPTIONAL STUDENT DIVISION OF PUBLIC SCHOOLS, STATE OF FLORIDA, DEPARTMENT OF EDUCATION.

Respondents (Plaintiffs):

S-1, a minor, by and through his mother and next friend, P-1; S-2, a minor, by and through his mother and next friend, P-2; S-3 and S-4, minors, by and through their mother and next friend, P-3; S-5 and S-6, minors, by and through their mother and next friend, P-4; S-7, a minor, by and through his mother and next friend, P-5; S-8, a minor, by and through his grandmother and next friend, P-6; S-9, a minor, by and through her foster mother and next friend, P-4; individually, and on behalf of all others similarly situated.

Respondents (Local Defendants):

JAMES C. EDWARDS, individually and in his official capacity as SUPERINTENDENT OF SCHOOLS, HENDRY COUNTY, FLORIDA; and WILLIAM M. GOBER, DARRELL R. HARRIS, CHAIRMAN, TERESA M. MILLICEVIC, BEAFORD B. DAVIDSON, ABNER VANN, and RAYMOND PITTMAN, individually, and in their official capacities as members of the DISTRICT SCHOOL BOARD OF HENDRY COUNTY, FLORIDA; and JIMMY O. PHIFER and DARYLE E. CUE, individually, and in their official capacities as PRINCIPAL and ASSISTANT PRINCIPAL, respectively, of Clewiston High School in HENDRY COUNTY, FLORIDA; and KENNETH DOOLEY, individually, and in his official capacity as DIRECTOR OF INSTRUCTIONAL SERVICES, District County School Board of Hendry County, Florida.

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OFFICIAL REPORTS OF CASE

The decision of the court of appeals is reported at 635 F.2d 342. The decision of the district court is not reported.

GROUNDS FOR INVOKING JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its decision on January 26, 1981, and its judgment at 2:09 p.m. on February 20, 1981. Rehearing was not sought. Jurisdiction is conferred by 28 U.S.C. §§1254(1) and 2101(c). The court of appeals decided a federal question in a way in conflict with a decision of this Court and decided an important federal question which has not been,

but should be, settled by this Court. There is a conflict among decisions, and the Court should exercise its power of supervision.

STATUTES AND REGULATIONS INVOLVED

I. Education for All Handicapped Children Act (EHA)

A. Law

1. 20 U.S.C. §1401(18) (1976)

> "(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

2. 20 U.S.C. §1415 (1976)

"Procedural Safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to --

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with

respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit --

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parent's or

guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of

this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2)

of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents

or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788."

B. Regulations and Comments

1. 45 C.F.R. §121a.513

"Child's status during proceedings

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission

to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

Comment: Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others."

2. 45 C.F.R. §121a.533

"Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550-121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a. 340-121a.349 of Subpart C."

3. 45 C.F.R. §121a.340

"As used in this part, the term 'individualized education program' means a written statement for a handicapped child that is developed and implemented in accordance with §§121a.341-121a.349."

4. 45 C.F.R. §121a.343(a)

"(a) General. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program."

5. 45 C.F.R. §121a.344

"Participants in meetings.

(a) General. The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to §121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) Evaluation personnel. For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation."

6. 45 C.F.R. §121a.346

"Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child,

and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved."

II. Section 504, Rehabilitation Act of 1973, as amended. 29 U.S.C. §794 (1976).

A. Law

"No otherwise qualified handicapped individual in the United States, as defined in Section 706(6), of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

B. Regulations and comments.

1. 45 C.F.R. §84.33 (a) and (d)

"Free appropriate public education.

(a) General. A recipient that operates a public elementary or

secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(d) Compliance. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later that September 1, 1978.

Comment: Free appropriate public education.

Former §§84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new §84.33. Under §84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for

the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

* * *

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to §84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA,

which places the highest priority on providing services to handicapped children who are not receiving an education."

2. 45 C.F.R. §84.35(c)

"(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §84.34."

3. 45 C.F.R. §84.36.

"Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions

regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement."

STATEMENT OF THE CASE

Petitioners are state officials and were defendants in the trial court. Other defendants were local officials of the Hendry County, Florida, school system. The plaintiffs and the local officials are Respondents. In this petition, the Respondents will be identified as Plaintiffs and Local Defendants.

Plaintiffs sought a declaration of their rights and injunctive relief (R. 32-35, 164-168). The alleged basis for jurisdiction was 28 U.S.C. §§1331(a), 1343(3) and (4), 2201, and 2202.

Fifteen months after they had been expelled from the public school system

by the Hendry County School Board, Plaintiffs (S-1, S-2, S-3, S-4, S-6 and S-8) filed suit in the United States District Court for the Southern District of Florida (R. 1; 447-449; Dx. 1, 2, 3, 4, 6, and 7). Three months later, they sought an "emergency" preliminary injunction (R. 173, 361). The District Court held a hearing a week before the expulsions were to end (T. 185, 230), and did not issue the preliminary injunction until after the school term and the expulsions had ended (R. 431).

Six Plaintiffs were expelled in October 1977, and one (S-5) was expelled in March 1978 (R. 447-450; Dx. 2, 3, 4, 5, 6, and 7). One of the Plaintiffs (S-1) secured a reversal of his expulsion

in a Florida court (R. 142; Franklin v. District Sch. Bd. of Hendry Cty., 356 So.2d 931 [Fla. 2d DCA 1978]), and, on remand for a new hearing, his conduct was found not to have been caused by his handicap (R. 447; Dx. 1). S-1 did not seek state appellate review of that order. Two of the Plaintiffs (S-7 and S-9) raised issues unrelated to expulsions (R. 447-450; Px. 15, 16, 18, and 19).

Twelve months after the expulsions, Plaintiffs' counsel contacted the Director of the Division of Public Schools for the Florida Department of Education (Px. 18), who responded to

Plaintiffs' counsel's inquiry (Px. 19) as follows:

> "I am asking our Bureau of Education for Exceptional Students to work closely with Hendry County personnel to insure that the requirements of Florida Law and of P. L. 94-142 are carried out in an appropriate manner. I am also asking, by copy of this letter, to be kept informed of all developments in regard to this matter, and particularly any actions which would appear violative of the above noted requirements.
>
> I am advised that Mr. John Bowen has been retained by the Board to assist in this matter. Mr. Bowen is a member of the State Advisory Committee, constituted under the provisions of P. L. 94-142, and is one of the most knowledgeable attorneys in the state on this topic. Therefore, I feel that the School

> Board has, and will be, properly advised in all actions they take regarding this matter."

Mr. Bowen's legal opinion (T. 202; Px. 17) was, in part, as follows:

> "It is my opinion that any child, handicapped or not, is subject to being disciplined for misconduct and such discipline includes expulsion from the school system and any of the programs offered therein. There are circumstances under which the handicapped child would not be subject to being expelled for misconduct. For instance, if the child's misconduct was a manifestation of the child's handicap, then expulsion would be inappropriate in such a circumstance."

Mr. Bowen concluded that the students could be reevaluated, but that there was no basis for a hearing "under the present circumstances."

After receiving Mr. Bowen's opinion, the local superintendent advised Plaintiffs' counsel that:

> "If any of the children would like, we could reevaluate them to determine whether or not their handicap led to the misconduct for which they were expelled. This reevaluation, however, will be afforded upon request and there is no need for a due process hearing.
>
> * * *
>
> Please do not hesitate to call me if you have any questions concerning this. We are anxious to help these youngsters in any way that we can." (Px. 16)

Eleven weeks later, Plaintiffs responded by filing suit.

The gist of the expelled Plaintiffs' complaint was that: they are mentally retarded; for a substantial number of years they had been assigned to a program for educating mentally retarded students; they were expelled during the school year 1977-78 for the remainder of that year and the following year (1978-79); twelve months after their expulsions (which were admitted to have been conducted in accordance with Goss v. Lopez, 419 U.S. 565 [1975]) they requested a hearing; the Local Defendants refused a hearing; and the Petitioners did not compel the Local Defendants to conduct a hearing. Consequently, Plaintiffs asserted that they had been denied their rights under Section

504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1976), (hereinafter Section 504), and the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 775, 20 U.S.C. §1401, et seq. (1976), (hereinafter EHA). They asserted that expulsion for any reason constitutes a change in placement under the cited laws, and that they should have been provided an educational program while they were expelled.

The district judge held that: (1) the EHA did not apply to Florida schools at the time Plaintiffs were expelled, but Plaintiffs become entitled to its benefits on September 1, 1978 (eleven months after their

expulsion) (R. 430); (2) Section 504 was in effect at the time of the expulsions (R. 430); (3) Section 504 and its implementing regulations (45 C.F.R. Part 84) "provide protections and procedures similar to those of the" EHA (R. 430); (4) expulsion is a change in placement within the meaning of the EHA (R. 430), and this decision cannot be made by the school board because "only a trained specialized group is capable of making the determination of whether the student's handicap bears a causal relationship to his misconduct" (R. 430); (5) Local Defendants had failed to provide Plaintiffs a hearing and the education required by Section 504 and the EHA (R. 428-431); (6) and

that, in light of the trial "court's findin that disciplinary proceedings do not supersede the Plaintiffs' rights under the EHA, the state officials' refusal to fulfill their supervisory responsibilities under the act is unjustified" (R. 433).

The Petitioners and Local Defendants appealed (R. 427-434, 435-436, 440, 454) pursuant to 28 U.S.C. §1292(a).

The United States Court of Appeals for the Fifth Circuit recognized that "whether an expulsion is a change in educational placement" was an issue of first impression for its circuit, and that neither the law nor implementing regulations

"provide this court any direction on this issue." 635 F.2d at 347. The court held:

> "We find the reasoning of the district court in Stuart v. Nappi, 443 F.Supp. 1235 (D. Conn. 1978), persuasive. [635 F.2d at 347]
>
> * * *
>
> While the trial court declined to decide the issue whether a handicapped student can ever be expelled, we cannot ignore the gray areas that may result if we do not decide this question. [635 F.2d at 348]
>
> * * *
>
> [W]e hold that under the EHA, section 504, and their implementing regulations: (1) before a handicapped student can be expelled, a trained and knowledgeable

group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition; (2) an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and section 504; (3) expulsion is a proper disciplinary tool under the EHA and section 504, but a complete cessation of educational services is not; (4) S-7 and S-9 were entitled to due process hearings; and, (5) the trial judge properly entered the preliminary injunction against the state defendants." [635 F.2d at 350]

REASONS FOR GRANTING THE WRIT

The issues presented have a substantial impact upon all public schools that operate federally assisted programs. Section 504 and the EHA have become a fertile ground for litigation; the regulations and the laws are detailed and complex but are subject to varying interpretations. Compare: S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), and Stuart v. Nappi, 443 F.Supp. 1235 (D. Conn. 1978), with Doe v. Koger, 480 F.Supp. 225 (N.D. Ind. 1979); Concerned Parents v. New York City Bd. of Ed., 629 F.2d 751 (2d Cir. 1980), with Lora v. Board of Ed. of City of New York, 456 F.Supp. 1211

(E.D. N.Y. 1978); Battle v. Com. of Pa., 629 F.2d 269 (3d Cir. 1980), with Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980), at n. 19; Eberle v. Board of Public Ed. of Sch. Dist., Etc., 444 F.Supp. 41 (D. Pa. 1977), with Frankel v. Commissioner of Ed., 480 F.Supp. 1156 (S.D. N.Y. 1979). See also: Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), which has been orally argued in this Court. The most diligent school administrator runs the risk of missing a stitch which may have substantial monetary consequences. In the past, such circumstances have been sufficient reasons for granting the writ. See United States v. Constantine, 296 U.S. 287, 290 (1935).

This Court's decision in Southeastern Community College v. Davis, 442 U.S. 397, 405-406 (1979), teaches that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context", that educational institutions need not "make substantial modifications in their programs to allow disabled persons to participate", and that what is required is that "an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap'".

The court of appeals' decision prohibits exclusion of any handicapped student. Under that decision, no

consideration is to be given to qualifications or to the reason for the intended action. If the student is handicapped, he must be served, and he can do no act that will end his right to be served.

A willingness to abide by a code of conduct is necessarily a "qualification" for attending school. The Court has recognized that some "modicum of discipline and order is essential if the educational function is to be performed" (Goss v. Lopez, 419 U.S. 565, 580 [1975]), and that the Constitution does not protect "conduct by the student, in class or out of

it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class-work or involves substantial disorder or invasion of the rights of others." See Tinker v. Des Moines Community School Dist., 393 U.S. 503, 513 (1969).

The "student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences." Goss v. Lopez, 419 U.S. 565, 579. The state's interest "is in the proper functioning of its public school system for the benefit of all pupils and the public generally."

Goss, supra, 419 U.S. at 591 (Justice Powell, with whom the Chief Justice, Justice Blackmun and Justice Rehnquist joined, dissenting). In his dissent in Tinker, supra, 393 U.S. at 524-525, Justice Black stated:

> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens-to be better citizens. . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils."

This theme was followed by the dissenters in Goss, supra, 419 U.S. at 593, when they stated that:

> "Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. . . . One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. . . . When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority-an invitation which rebellious or even merely spirited teenagers are likely to accept."

This Court has recognized that "the appropriate means of maintaining

school discipline is committed generally to the discretion of school authorities." Ingraham v. Wright, 430 U.S. 651, 682 (1977).

Petitioners recognize that an opportunity for an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954).

What these Petitioners seek is the recognition of their authority, under the law, to treat equals as equals; i.e., when behavior is not caused by a handicap, they should not be required to provide "unequal" treatment for the student who misbehaves.

Nothing in the Fourteenth Amendment "singles out some 'persons' for more 'equal' treatment than others"; and, even though Congress enjoys broad powers under its Spending Power and Section 5 of the Fourteenth Amendment, "Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their powers." Fullilove v. Klutznick, ___ U.S. ___, 65 L.Ed.2d 902, 955-956 (1980), (Justices Stewart and Rehnquist, dissenting). This Court does not defer to Congress on constitutional questions, but it gives great weight to a considered decision of Congress. See Fullilove, supra, ___ U.S. ___,

at ____, 65 L.Ed.2d at 920. In the EHA, Congress found that:

> "[I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of the handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, §3(a), 89 Stat. 775.

The court of appeals' decision does much more than assure equal protection of the law; it relieves the handicapped student of any obligation to conform to uniformly applied and accepted standards of conduct.

The EHA was introduced in the First Session of the 94th Congress as S. 6 and, as finally enacted, is the

product of a conference to resolve amendments made by the House. The Senate Committee Report, S. Rep. No. 94-168, 94th Cong., 1st Sess. 22 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1446, states:

> "The Committee rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education. The Committee recognizes the State's primary responsibility to uphold the Constitution of the United States and their own State Constitutions and State laws as well as the Congress' own responsibility under the 14th Amendment to assure equal protection of the law."

The Senate Conference Report, S. Rep. No. 94-455, 94th Cong., 1st Sess. 28-29 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1481-1482, states that:

> "The Senate bill and the House amendments add a new statement of purpose section in section 601 of the Education of the Handicapped Act.
>
> * * *
>
> The Senate bill and the House amendments find that it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children. The Senate bill not the House amendments, states that it is in the national interest that the Federal Government assist State and local efforts in order

to assure equal protection of the law. The House recedes.

* * *

The conference substitute provides that it is the purpose of the title to assure that all handicapped children have available to them within the time period specified in section 612(2)(B) of the Act a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

The Senate bill states that the purpose is to insure that the rights of handicapped children are protected: the House amendments state that the purpose is to assure that the rights of handicapped children are protected. The Senate recedes.

The Senate bill states that the purpose is to relieve the fiscal burden placed upon States and localities when they provide for the education of all handicapped

> children: the House amendments state that the purpose is to assist States and localities to provide for the education of all handicapped children. The Senate recedes."

The Senate Conference Report shows that there was no intent to alter the substantive aspects of the relationship between a state and its handicapped students.

In Doe v, Koger, 480 F.Supp. 225, 229 (N.D. Ind. 1979), which was cited in the Fifth Circuit's opinion, the court held:

> "[T]he handicapped act does not prohibit all expulsions of disruptive handicapped children. It only prohibits the expulsion of handicapped children who are disruptive because of their handicap.

* * *

> It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble."

The court of appeals held that "expulsion is a proper disciplinary tool under the EHA and §504, but a complete cessation of educational services is not." 635 F.2d at 350. This holding is based upon the court's conclusion that it cannot "authorize the complete cessation of educational services during an expulsion period." 635 F.2d at 348. The court also held that a termination of educational services, occasioned by an "expulsion, is a change in educational placement."

635 F.2d at 348. This aspect of the court's decision nullifies the provisions of Section 228.041(28), Florida Statutes (1977), which states that: "Expulsion is the removal of the right and obligation of a student to attend a public school . . . ."

The effect of the court's decision is to nullify a state's authority to terminate a handicapped student's right to an education. The fact that the activity, or behavior, is not caused by the handicap becomes irrelevant. Two classes of students are created. A student who is confined to a wheelchair and sells drugs in the classroom must be provided an education; but a similarly situated student, who is

not handicapped, may have his right to an education terminated through the expulsion process. The court of appeals' decision goes far beyond the purpose of Section 504 (to prevent expulsion of an otherwise qualified student solely because of handicap) and the EHA (to assure equal protection of the law for the handicapped student).

The court of appeals acknowledged that Congress did not intend to remove the school board's "long-recognized authority and responsibility to ensure a safe school environment" (635 F.2d at 348, n. 9), but the court of appeals failed to follow this intent and it nullified this authority when it imposed the change in placement procedures. If the disciplinary

process must give way to the change in placement procedures, the offending student may assert a right to remain in the classroom. See 20 U.S.C. §1415(e)(3), which, in part, provides that:

> "During the pendency of any proceeding conducted pursuant to this section, unless [the parties] otherwise agree, the child shall remain in the then current educational placement of such child . . . ."

Therefore, if a child has been identified as a handicapped child and has been placed in a program, or has not been so identified but asserts that he is handicapped, the school authorities are placed between a rock and a whirlpool. Should the child be returned to the classroom while the

school authorities touch each base? The regulations authorize an educational agency to use "its normal procedures for dealing with children who are endangering themselves and others." See comment to 45 C.F.R. §121a.513, and the comment and response concerning this regulation at 42 Fed. Reg. 42,512. However, the decision of the court of appeals requires use of the change in placement procedure. The decision of the court of appeals creates confusion in the law; it is not soundly based upon any requirement of the law or regulation; and it is contrary to the expressed intent of the regulation.

The purpose of Section 504 is described in comments (42 Fed. Reg. 22,676) as follows:

> "From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex.
>
> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely, or denied equal treatment, simply because they are handicapped.
>
> * * *
>
> The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved."

Neither the Section 504 regulations nor the regulator's comments

specifically address the determinative issue: i.e., whether expulsion is a change in placement? They do state that the regulation:

> "[G]enerally conforms to the standards established for the education of handicapped persons in Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. 1971), 343 F.Supp. 279 (E.D. Pa. 1972), and Lebanks v. Spears, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA)."
>
> * * *
>
> These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap. . . ." 42 Fed. Reg. 22,690.

The Senate Committee report for the EHA also made reference to the decision in Mills. See S. Rep. No. 94-168, supra, at pages 22-23.

The Mills decision was based upon particular provisions of the District of Columbia Code, the due process and equal protection analysis of Hobson v. Hansen, 269 F.Supp. 401, 493 (D.D.C. 1967), and the fact that students were being expelled "without any prior hearing."

The decisions cited by the regulators and Congress predate this Court's decision in Goss v. Lopez, 419 U.S. 565 (1975). None of the cases cited by Congress or the regulators support the notion that there is any constitutional provision which

mandates that a handicapped student's right to a free public education cannot be terminated. In defining "free appropriate public education", Congress anchored the definition to that educational opportunity which had been provided by states in the past. See 20 U.S.C. §1401(18) (1976). Congress recognized, as this Court has recognized, that substantive rights and their dimensions are created by state laws (Goss v. Lopez, 419 U.S. 565, 572-573 [1975]) and that it cannot "create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School District v. Rodriguez 411 U.S. 1, 33 (1973).

If the court of appeals' determination—that it had no authority to authorize a complete cessation of educational services—is correct, then it necessarily follows that Congress proceeded from a concern for due process and equal protection to an outright usurpation of the local school authorities' historical control of the need and means for student discipline, and then mandated unequal laws for the discipline of handicapped students solely because of their handicap. Neither the law (the EHA and Section 504) nor its legislative history supports the view that this was the intent. No such intent should be implied. The fact that Congress has

broad power when it acts to enforce the Fourteenth Amendment does not nullify a state's immunity under the Eleventh Amendment, or its power and authority, unless there is clear language to show that Congress intended that a state's power be swept away. Compare: Quern v. Jordan, 440 U.S. 332, 340-345 (1979), and National League of Cities v. Usery, 426 U.S. 833 (1976), with Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and Hutto v. Finney, 437 U.S. 678 (1978).

The EHA and Section 504 regulations should have been applied in accordance with the principles in Southeastern Community College v. Davis, 442 U.S. 397 (1979); namely:

> "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of §504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
> (442 U.S. at 410).
>
> * * *
>
> Although an agency's interpretation of the statute under which it operates is entitled to some deference 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.'"
> (442 U.S. at 411)

When states seek federal grants they do so based upon the reguirements of law and lawful regulations. It is easy to say that when a state

accepts the funds it accepts the conditions. See, Lau v. Nichols, 414 U.S. 563, 568 (1974). However, states should not be subjected to conditions that were not expressed when the funds were sought, because to do so is to unilaterally change the terms under which the state agreed to administer the funds. There was no notice to a state, when it submitted its application for funds under the EHA, that it must provide educational opportunities to disruptive students solely because they are handicapped, and notwithstanding the absence of a causal nexus with the handicap. There was no indication that, under

either set of regulations, expulsion constituted placement. The courts below erred in holding that expulsion is a change in placement and that defendants had failed to perform a duty required under the EHA or Section 504.

The State Defendants did not fail to perform a duty to see that local officials comply with the law. The Plaintiffs' contentions were raised long after the expulsions.

The EHA was not in effect at the time the Plaintiffs were expelled; Section 504 was in effect, but there is no evidence that Plaintiffs were under a federal program. This is the operative fact that is necessary to

make Section 504 applicable. The courts below found that both Section 504 and the EHA were applicable to the expelled students. The Plaintiffs, who were serving a period of expulsion, were not entitled to the benefits of the EHA when it subsequently became effective in Florida. Section 504, if it was applicable, imposed no duty upon the school district except to treat handicapped students the same as nonhandicapped students.

With the court of appeals' decision, we see a metamorphosis: a legitimate concern for due process in providing educational opportunities to handicapped students (Mills, supra) for assuring equal protection of the

law for students in a particular federally assisted program (EHA), and a specific prohibition against exclusion of an otherwise qualified person solely because of a handicap (Section 504), have become a universal mandate that the handicapped student must be provided educational opportunities despite his will to cause trouble.

The court of appeals decided important questions of federal law which should be decided by this Court.

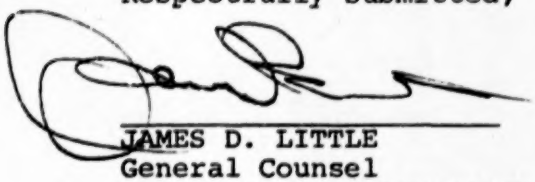
There is no clear statutory or regulatory mandate for the court of appeals' decision on the issues,

and it represents a clear departure from the requirements of law. This Court should grant the writ to exercise its power to supervise federal courts.

CONCLUSION

The writ should be granted.

Respectfully submitted,



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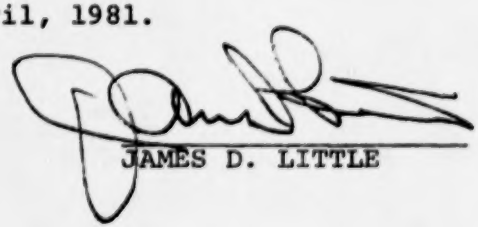
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix were mailed to JOHN W. BOWEN, Post Office Box 3462, Orlando, Florida 32802, and JACOB A. ROSE, Florida Rural Legal Services, 105 South Narcissus Avenue, Citizens Building, Suite 412, West Palm Beach, Florida 33401, this 17th day of April, 1981.



JAMES D. LITTLE

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

S-1, a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees,

v.

Ralph D. Turlington, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants.

No. 79-2742

January 26, 1981

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge.

In this appeal, we are called upon to decide whether nine handicapped students were denied their rights under the provisions of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1415, or section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. §794 and their implementing regulations. The trial court found a denial of rights and entered a preliminary injunction against the state and local officials. Defendants attack the trial court's entry of a preliminary injunction as an abuse of discretion. Because we find that the trial court did not abuse its

discretion in entering the preliminary injunction, we affirm.

FACTS

Plaintiffs, S-1, S-2, S-3, S-4, S-5, S-6, and S-8, were expelled from Clewiston High School, Hendry County, Florida, in the early part of the 1977-78 school year for alleged misconduct.[1] Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year, the maximum time permitted by state law. All of the plaintiffs were classified as either

1. The misconduct upon which the expulsions were based ranged from masturbation and other sexual acts against fellow students to willful defiance of authority, insubordination, vandalism, and the use of profane language.

educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. It is undisputed that the expelled plaintiffs were accorded the procedural protections required by Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Except for S-1, they were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap. Regarding S-1, the superintendent of Hendry County Schools determined that because S-1 was not classified as seriously emotionally disturbed, his misconduct, as a matter of law, could not be a manifestation of his handicap.

At all material times, plaintiffs S-7 and S-9 were not under expulsion

orders. S-7 was not enrolled in high school by his own choice. In October, 1978, he requested a due process hearing to determine if he had been evaluated or if he had an individualized educational program. S-9 made a similar request in October, 1978. Shortly before her request, S-9's guardian had consented to the individualized educational program being offered her during that school year. The superintendent denied both student's requests, but offered to hold conferences in order to discuss the appropriateness of their individualized educational program.

Plaintiffs initiated this case alleging violations of their rights under the Education For All Handicapped Children Act, (EHA) 20 U.S.C. §§ 1401-1415, and section 504 of the Rehabilitation

Act of 1973, 29 U.S.C. §794. Plaintiffs sought preliminary and permanent injunctive relief compelling state and local officials to provide them with the educational services and procedural rights required by the EHA, section 504, and their implementing regulations.

TRIAL COURT DECISION

The trial court found that the EHA, effective in Florida on September 1, 1978, provided all handicapped children the right to a free and appropriate public education. The court further found that the expelled students were denied this right in violation of the EHA. In addition, the trial court decided that under section 504 and the EHA, no handicapped student could be expelled for misconduct related to the handicap. That in the

case of S-2, S-3, S-4, S-5, S-6, and S-8, no determination was ever made of the relationship between their handicaps and their behavioral problems. With regard to S-1, the trial court found that the superintendent's determination was insufficient under section 504 and the EHA. The court reasoned that an expulsion is a change in educational placement. That under educational placement procedures of section 504 and the EHA, only a trained and specialized group could make this decision. For these reasons, the trial court concluded that the likelihood of success on the merits had been shown with respect to the expelled plaintiffs.

With regard to S-7 and S-9, the trial court stated that under 20 U.S.C.

§ 1415(b)(1)(E),[2] students and their parents or guardians must be provided "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." That under 20 U.S.C. §1415(b)(2),[3] "whenever such a complaint

2. 20 U.S.C. § 1415(b)(1)(E) provides:

> (b)(1) The procedures required by this section shall include, but shall not be limited to:
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such a child.

3. 20 U.S.C. § 1415(b)(2) provides:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency. No hearing conducted pursuant to the requirements

has been received, the parents or guardians shall have an opportunity for an impartial due process hearing." The trial court found that the superintendent's failure to grant S-7 and S-9 impartial due process hearings contravened the express provisions of the EHA. The court therefore concluded that S-7 and S-9 had shown a likelihood of success on the merits of their claim.

Finally, the trial court found that the plaintiffs had suffered irreparable harm in that two years of education had been irretrievably lost. The court further determined that an injunction was necessary to ensure that plaintiffs

of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

would be provided their rights, even though the expulsions had expired at the time the injunction was entered.

STATEMENT OF ISSUES

In an appeal from an order granting preliminary relief, the applicable standard of review is whether the issuance of the injunction, in light of the applicable standard, constitutes an abuse of discretion.[4] Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); Canal Authority of State of

4. Prerequisites for the granting of a preliminary injunction are: (1) substantial likelihood that plaintiff will prevail on the merits; (2) substantial threat that plaintiff will suffer irreparable injury if injunction is not granted; (3) threatened injury to plaintiff outweighing threatened harm injunction may do to defendants; and, (4) absence of disservice to the public interest if the injunction should be granted. Defendants only seriously challenge the trial court's findings regarding the first two prerequisites. Accordingly, we confine our discussion to those elements.

Florida, 489 F.2d 567 (5th Cir. 1974). Therefore, in order to decide whether the trial court abused its discretion in entering the preliminary injunction, we must resolve the following issues: (1) whether an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and section 504; (2) whether the EHA, section 504, and their implementing regulations contemplate a dual system of discipline of handicapped and non-handicapped students; (3) whether the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap, is on the state and local officials or on the student; (4) whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings; and, (5) whether the trial judge properly

entered the preliminary injunction against the state defendants.

DISCUSSION

Section 504 of the Rehabilitation Act and the EHA have been the subject of infrequent litigation. No reported appellate cases deal with these acts and the issues presented in the instant case. Therefore, a review of these statutes and their pertinent regulations is necessary to the disposition of this controversy.

Section 504, effective in Florida four months prior to the expulsions in question, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the

> benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .

Under 29 U.S.C. § 706(7)(B), a handicapped individual is defined as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities . . ."

Under the EHA, 20 U.S.C. § 1412(1)[5] and (5)(B),[6] effective in Florida on September 1, 1978, a state receiving

5. 20 U.S.C. § 1412(1) provides:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

6. 20 U.S.C. § 1412(5)(B) provides:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

financial assistance under this Act is required to provide all handicapped children a free and appropriate education in the least restricted environment. The definition of handicapped children under the EHA is similar to the definition under Section 504.

Florida, and the Hendry County School Board, are recipients of federal funds both section 504 and the EHA. The children in this suit are clearly handicapped

> (5) The State has established . . . (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily[.]

within the meaning of both section 504 and the EHA. The parties agree that a handicapped student may not be expelled for misconduct which results from the handicap itself. It follows that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap. From a practical standpoint, this is the only logical approach. How else would a school board know whether it is violating section 504?

Defendant local officials argue that they complied with section 504. As support for their position, they state that they determined, in the expulsion proceedings, that the plaintiffs were capable of understanding rules and regulations or right from wrong. They also assert that they found, based upon a psychological evaluation, that plaintiffs' handicaps

were not behaviorial handicaps (as it would be if plaintiffs were classified as seriously emotionally disturbed), thereby precluding any relationship between the misconduct and the applicable handicap. We cannot agree that consideration of the above factors satisfies the requirement of section 504. A determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap. The second prong of the school officials' argument is unacceptable. Essentially, what the school officials assert is that a handicapped student's misconduct can never be a symptom of his handicap, unless he is classified as seriously emotionally disturbed. With regard to this argument, the

trial court stated:

> The defendants concede that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself. However, they would limit application of this principle to those students classified as "seriously emotionally disturbed." In the Court's view such a generalization is contrary to the emphasis which Congress has placed on individualized evaluation and consideration of the problems and needs of handicapped students.

We agree. In addition, the uncontradicted testimony elicited at the preliminary injunction hearing suggests otherwise. At the hearing, a psychologist testified that a connection between the misconduct upon which the expulsions were based and the plaintiffs' handicaps may have existed. She reasoned that "a child with low intellectual functions and perhaps the lessening of control would respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior." She

further testified that an orthopedically handicapped child, whom she had consulted,

> [w]ould behave in an extremely aggressive way towards other children and provoke fights despite the fact that he was likely to come out very much on the short end of the stick. That this was his way of dealing with stress and dealing with a feeling of physical vulnerability. He would be both aggressive and hope that he would turn off people and as a result provoke an attack on him.

The record clearly belies the school officials' contention.

FIRST ISSUE

With regard to plaintiff S-1, the trial court found that the school officials entrusted with the expulsion decision determined at the disciplinary proceedings that S-1's misconduct was unrelated to his handicap. The trial Court, however, held that this determination was made by school board officials

who lacked the necessary expertise to make such a determination. The trial court arrived at this conclusion by holding that an expulsion is a change in educational placement. Under 45 CFR § 121a.533(a)(3)[7] and 45 CFR § 84.35(c)(3),[8] evaluations and placement decisions

7. 45 C.F.R. § 121a.533(a)(3) provides in pertinent part that:

> (a) In interpreting evaluation data and in making placement decisions, each public agency shall:
> (3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. . . .

8. 45 C.F.R. § 84.35(c)(3) provides in pertinent part that:

> (c) In interpreting evaluation data and in making placement decisions, a recipient shall:
> (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

must be made by a specialized and knowledgeable group of persons.

The trial court's finding presents the novel issue in this circuit whether an expulsion is a change in educational placement, thereby invoking the procedural protections of both the EHA and section 504 of the Rehabilitation Act. In deciding this issue, the EHA and section 504, as remedial statutes, should be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students.

The EHA, section 504, and their implementing regulations do not provide this court any direction on this issue. We find the reasoning of the district court in Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn.1978), persuasive. In Stuart, a child was diagnosed as having

a major learning disability caused by either a brain disfunction or a perceptual disorder. She challenged the use of disciplinary proceedings which, if completed, would have resulted in her expulsion for participating in a school-wide disturbance. The trial court held that the proposed expulsion constituted a change in educational placement, thus requiring the school officials to adhere to the procedural protections of the EHA. In so holding, the court stated:

> The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children [without following the procedures prescribed by the EHA]. . . . An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her

> academic and social development. This result flies in the face of the explicit mandate of the handicapped act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. [Citation omitted.]

443 F.Supp. at 1242-43.

We agree with the district court in Stuart, and therefore hold that a termination of educational services, occasioned by an expulsion, is a change in educational placement, thereby invoking the procedural protections of the EHA.

The proposition that an expulsion is a change in educational placement has been cited with approval in Sherry v. New York State Education Department, 479 F.Supp. 1328 (W.D.N.Y.1979) (legally blind and deaf student that suffered from brain damage and emotional disorder which made her self abusive suspended because of insufficient staff to care for her), and Doe v. Koger, 480 F.Supp.

225 (N.D.Ind.1979) (EHA case in which mildly mentally handicapped student was expelled for the remainder of the school term for disciplinary reasons pursuant to the procedures provided for all Indiana public school disciplinary expulsions). As stated by the district court in Doe v. Koger, our holding that expulsion of a handicapped student constitutes a change in educational placement distinguishes the handicapped student in that, "unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures

required by the handicapped act." Doe v. Koger, 480 F.Supp. at 229.[9]

9. This opinion does not infringe upon the traditional authority and responsibility of the local school board to ensure a safe school environment. A comment to the regulations provides: "While the placement may not be changed, this does not preclude dealing with children who are endangering themselves or others." 45 C.F.R. § 121(a).513 (comment). Thus the local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. In such case, the child would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement. It is appropriate to superimpose this very limited authority, as contemplated by the above quoted comment, because nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards -- who alone are accountable to the entire school community — their long-recognized authority and responsibility to ensure a safe school environment.

SECOND ISSUE

The school officials point out that a group of persons entrusted with the educational placement decision could never decide that expulsion is the correct placement for a handicapped student, thus insulating a handicapped student from expulsion as a disciplinary tool. They further state that Florida law does not contemplate this result because expulsion is specifically provided for under Florida law as a disciplinary tool for all students. While the trial court declined to decide the issue whether a handicapped student can ever be expelled, we cannot ignore the gray areas that may result if we do not decide this question. We therefore find that expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures

are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

THIRD ISSUE

State defendants focus their attention on the fact that, with the exception of S-1, none of the expelled plaintiffs raised the argument, until eleven months after expulsion, that they could not be expelled unless the proper persons determined that their handicap did not bear a causal connection to their misconduct. By this assertion, we assume that state defendants contend that the handicapped students waived their right to this determination. The issue is therefore squarely presented whether

the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap is on the state and local officials or on the student. The EHA, section 504, and their implementing regulations do not prescribe who must raise this issue. In light of the remedial purposes of these statutes, we find that the burden is on the local and state defendants to make this determination. Our conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights under the EHA and section 504.

FOURTH ISSUE

The next issue is whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings. School officials suggest that because S-7 and S-9 had voluntarily withdrawn from school, they were not entitled to due process hearings. They also suggest that the conference offered by the superintendent was an adequate substitute for the due process hearings. They cite 45 CFR 121a.506[10] as support for their argument.

10. The comment to 45 C.F.R. 121a.506 implementing 20 U.S.C. §1416(b)(2) provides:

> Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning

Under this regulation, the Department of Health, Education and Welfare (HEW) (now Health and Human Resources), states in a comment that mediation can be used to resolve differences between parents and agencies without the development of an adversarial relationship. The Justice Department, as amicus curiae, and the trial court, point out that under 20 U.S.C. § 1415(b)(1), parents and guardians

> the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

of handicapped children must have "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public eduation to such child." The statute also states, in section 1415(b), that "whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing. . . ." No exception is made for handicapped students who voluntarily withdraw from school or previously agree to an educational placement. With regard to defendants' argument under 45 CFR § 121a.506, HEW states in the same comment that mediation may not be used to deny or delay a parent's rights under

this subpart. In the circumstances, the trial judge correctly found that plaintiffs S-7 and S-9 were entitled to due process hearings.

FIFTH ISSUE

State defendants advance three arguments that deserve comment. First, they assert that the trial judge erred in analyzing section 504 in light of the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). In that case, the issue was whether section 504, which prohibits discrimination against an otherwise qualified handicapped individual enrolled in a federally funded program, solely by reason for his handicap, forbids professional schools from imposing physical qualifications

for admission to their clinical training program. The Supreme Court held that section 504 did not forbid professional schools from imposing physical qualifications for admission. Without discussing Southeastern any further, it is clear that it does not apply to this case. Physical qualifications are not at issue in this case. Furthermore, we do not deal here with a professional school.

Secondly, state defendants argue that the trial court erred in imposing the EHA as a requirement at the time of the expulsions because the EHA was not effective in Florida until September 1, 1978. The trial court did not impose the EHA as a requirement at the time of the expulsion. The court found that the expelled plaintiffs became entitled to the protections of the EHA on September

1, 1978. As such, the expelled plaintiffs became entitled to a free and appropriate education in the least restrictive environment. In fact, under 20 U.S.C. § 1412(3),[11] because plaintiffs were not receiving educational services on September 1, 1978, they fell within a special class of handicapped students entitled to priority regarding the provision of a free and appropriate education. The only way in which the expulsions would have continued as of

11. 20 U.S.C. § 1412(3) provides in pertinent part that:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (3) The State has established priorities for providing a free and appropriate public education to all handicapped children . . . first with respect to handicapped children who are not receiving an education[.]

September 1, 1978, is if a qualified group of individuals determined that no relationship existed between the plaintiffs' handicap and their misconduct. Furthermore, section 504, effective at the time of the expulsions, provides protections and procedures similar to those of the EHA. See, North v. District of Columbia Board of Education, 471 F.Supp. 136 (D.D.C.1979).

Finally, the state officials argue that the trial court improperly entered the injunction against them. They assert that they lacked the authority to intervene in the expulsion proceedings because disciplinary matters are exclusively local. While this argument may be true regarding non-handicapped

students, it is inapplicable to handicapped students. Expulsion proceedings are of the type that may serve to deny an education to those entitled to it under the EHA. Under 20 U.S.C. § 1412 (6), the state educational agency is:

> [R]esponsible for assuring that the requirements of this sub-chapter be carried out and that all educational programs for handicapped children within the state, including all such programs administered by any other state or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and shall meet educational standards of the state educational agency.

Clearly, the state officials were empowered to intervene in the expulsion proceedings under 20 U.S.C. § 1412(6).

CONCLUSION

Accordingly, we hold that under the EHA, section 504, and their implementing regulations: (1) before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition; (2) that an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and section 504; (3) that expulsion is a proper disciplinary tool under the EHA and section 504, but a complete cessation of educational services is not; (4) that S-7 and S-9 were entitled to due process hearings; and, (5) the trial judge properly entered the preliminary

injunction against the state defendants. In the circumstances, the trial judge did not abuse his discretion in entering the injunction.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-8020-Civ-CA WPB

S-1, a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees,

v.

Ralph D. Turlington, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants.

PRELIMINARY INJUNCTION

THIS CAUSE having come before the Court for hearing on motion of plaintiffs for preliminary injunction and the Court having considered the evidence and memoranda presented by the parties and being otherwise duly advised, and having determined that a preliminary injunction should issue based upon the findings and conclusions set forth in the memorandum opinion entered herewith, it is

ORDERED AND ADJUDGED as follows:

1. Defendants, James C. Edwards, Superintendent of Hendry County Schools, and William G. Gober, Darrell R. Harris, Teresa M. Milicenvic, Kenneth Dooley, Beaford E. Davidson and Raymond Pittman, members of the School Board of Hendry County, shall:

(a) immediately take affirmative steps to insure that plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 are placed in a program in the District School System of Hendry County, Florida, wherein they will be provided with a free and appropriate education in the least restrictive environment, in accordance with the requirements of the Education For All Handicapped Children Act, 20 U.S.C. §1401 et seq., and its implementing regulations, 45 C.F.R. Part 121a.;

(b) immediately insure that a review of the evaluations of each of the named plaintiffs is conducted to determine whether they have been properly evaluated in accordance with 45 C.F.R. §§121a.530-121a.534, and perform such

reevaluations as may be required by 45 C.F.R. §121a.534;

(c) immediately insure that a review of the educational placement of each named plaintiff is conducted in light of the required evaluations and any independent educational evaluations which plaintiffs have obtained as provided in 45 C.F.R. §121a.503, and make appropriate placements in accordance with 45 C.F.R. §121a.533;

(d) immediately take all necessary steps to insure that an individualized education program for each named plaintiff is developed and implemented in accordance with 45 C.F.R. §§121a.341-121a.349.

2. Defendants, Ralph D. Turlington, Bill Gunter, George Firestone, Jim Smith, Gerald Lewis, Doyle Conner, members of the State of

Florida Board of Education, Carey E. Ferrell, Jr. and Landis Stetler, members of the State Department of Education, shall insure that local school officials of Hendry County are complying with the terms of this preliminary injunction and are providing plaintiffs with all the rights to which they are entitled under the Education For All Handicapped Children Act, 20 U.S.C. §1401 et seq. and its implementing regulations, 45 C.F.R. Part 121a.

DONE AND ORDERED in chambers at Miami, Florida, this 15th day of June, 1979, at 1:15 p.m.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-8020-Civ-CA WPB

S-1, a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees,

v.

Ralph D. Turlington, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants.

MEMORANDUM OPINION

Plaintiffs, S-1 through S-9, are mentally handicapped students who reside within the District School System of Hendry County, Florida. Plaintiffs have alleged violations of their rights under the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs seek a preliminary injunction compelling state and local officials to provide them with the educational services and procedural rights which they allege are required by the Handicapped Act and its implementing regulations.

The following findings and conclusions are made for the purpose of

determining whether a preliminary injunction should issue pursuant to Rule 65, Fed.R.Civ.P., and are not a final determination of the merits of plaintiffs' claims.

The criteria which govern the issuance of a preliminary injunction in this circuit are well established. Plaintiffs must show (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiffs outweighs the harm the injunction may do to defendants, and (4) that granting the injunction will not disserve the public interest. Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975).

Plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 were each expelled from

Clewiston High School in the early part of the 1977-78 school year for alleged misconduct. Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year, the maximum time permitted by state law. During this time these plaintiffs have received no educational services. Plaintiffs S-7 and S-9 are not under expulsion orders but contend they are not being given a free and appropriate education, in that they have not been properly evaluated and placed. An impartial due process hearing, pursuant to 20 U.S.C. §1415 (b)(1),(2), was requested on behalf of each plaintiff and was denied.

The Handicapped Act provides for federal assistance to the states for the education of handicapped children.

20 U.S.C. §§1411 et seq. Eligibility for such assistance is conditioned upon existence of a state policy assuring all handicapped children the right to a free appropriate public education and a state plan approved by the Commissioner of Education setting forth policies and procedures designed to meet this goal. 20 U.S.C. §§1412, 1413. The act and its implementing regulations (codified at 45 C.F.R. §121a) require, inter alia, that handicapped students be given a free and appropriate education in the least restrictive environment, be evaluated at least every three years to determine appropriate placement, and be provided with an individualized education program which must be reviewed annually. The act and regulations also provide procedural safeguards. 20 U.S.C. §1415; 45 C.F.R. §121a.500 et seq.

The defendants do not dispute that plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 have not received a free and appropriate education since the time of their expulsions and that they have been denied impartial due process hearings to challenge their placement. Rather, the defendants take the position that these handicapped students lost the right to a free and appropriate education through misconduct; that they received the procedural protection required by Goss v. Lopez, 419 U.S. 565 (1975), in connection with their expulsions; and that they are not entitled to the protections of the Handicapped Act during the term of the expulsions. Defendants contend that disciplinary procedures are independent of and should not be limited by the procedures required by the Handicapped Act.

Defendants have conceded that a handicapped student may not be expelled for misconduct which results from the handicap itself. However, defendants argue that since these students were classified as "educable mentally retarded" (EMR) and not as "seriously emotionally disturbed" their handicap is unrelated to the misconduct and should not exempt them from disciplinary action. Plaintiffs dispute the conclusion that disciplinary problems are unrelated to their handicap, but also contend that the Handicapped Act prohibits the denial of a free and appropriate education to a handicapped student even for disciplinary reasons, irrespective of whether the student's misconduct is related to his handicap.

Plaintiffs S-7 and S-9 requested impartial due process hearings based on defendants' alleged failure to provide proper evaluations and to develop individualized educational programs. Defendants based their denial of such hearings on the grounds that a due process hearing is not designed to determine whether or not an IEP has been developed or whether or not there have been proper evaluations but is only designed to determine whether the program or results of the testing are appropriate.

The Court finds that plaintiffs have made an adequate showing of likelihood of success on the merits. As noted above, it is undisputed that the requirements of the Handicapped Act have not been met with respect to the expelled plaintiffs. The Court cannot

agree with defendants' argument that disciplinary procedures are totally independent of and may supersede the rights of students under the Handicapped Act. The defendants concede that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself, however, they would limit application of this principle to those students classified as "seriously emotionally disturbed." In the Court's view such a generalization is contrary to the emphasis which Congress has placed on individualized evaluation and consideration of the problems and needs of handicapped students. The Court does not find it necessary to determine at this juncture whether a handicapped student may ever be expelled for misconduct

unrelated to his handicap. In the case of these expelled plaintiffs no adequate determination was ever made of the relationship, vel non, between their handicaps and their behavioral problems. With the exception of plaintiff S-1, this issue does not appear to have ever been addressed. In the disciplinary proceedings resulting in the expulsion of S-1, a finding was made that his misconduct was unrelated to his handicap. However, this determination was made by school board officials who do not have the expertise necessary to make such a determination.

In the only reported case dealing with the interaction between disciplinary procedures and the procedures under the Handicapped Act, the court found expulsion to be a change in placement

within the meaning of the Handicapped Act. Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn. 1978). This Court is in agreement with that conclusion. Evaluations and placement decisions must be made by a specialized, knowledgeable group of persons. 45 C.F.R. §121a.532(3), .533(a)(3). In the view of this Court, only such a trained, specialized group is capable of making the determination of whether the student's handicap bears a causal relationship to his misconduct.

Although each of the expulsions in question occurred prior to the date the Handicapped Act became effective in Florida, the plaintiffs became entitled to its protections on September 1, 1978. In addition, Section 504 of the Rehabilitation Act of 1973 and its implementing regulations, 45 C.F.R., Part 84, provide

protections and procedures similar to those of the Handicapped Act, which were in effect at the time of the expulsions. See Howard S. v. Friendswood Independent School Dist., 454 F.Supp. 634 (S.D. Tex. 1978).

A likelihood of success has also been shown with respect to plaintiffs S-7 and S-9. The Handicapped Act requires that handicapped students and their parents or guardians be provided

> "an opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate education to such child."

20 U.S.C. §1415(b)(1)(E). The act further provides that whenever such a complaint has been received the parents or guardians shall have an opportunity for an impartial due process hearing.

20 U.S.C. §1415(b)(2). These provisions are also incorporated into the regulations. See 45 C.F.R. §121a.506. The complaint that plaintiffs S-7 and S-9 have not been properly evaluated and do not have individualized educational programs clearly falls within these provisions, and these plaintiffs are entitled to the requested impartial due process hearings to resolve this dispute.

Plaintiffs have suffered and continue to suffer irreparable harm each day they are deprived of a free and appropriate education. Almost two school years of education have been irretrievably lost to the expelled plaintiffs. As the Senate Committee which considered the Handicapped Act noted, the Supreme Court established

the principle in Brown v. Board of Education, 347 U.S. 483 (1954), that

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

S.Rep.No. 94-168, 94th Cong., 1st Sess. 6 (1975); 1975 U.S. Code Cong. & Ad. News, 1425, 1430. The committee further recognized that

> "With proper education services many [handicapped persons] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."

Id. at 1433.

Defendants argue that in light of the fact that the expulsions end with the 1978-79 school year (which ended between the date of the hearing on this motion and the entry of this opinion), the plaintiffs will not suffer irreparable harm, and an injunction is unnecessary, because all the rights to

which plaintiffs are entitled will now be provided. In view of the defendants' past refusal to provide plaintiffs with the rights to which they are entitled under the Handicapped Act, in particular with respect to the two plaintiffs who were not under expulsion orders, the Court finds that a preliminary injunction is necessary to insure that plaintiffs will receive their educational and procedural rights under the act during the pendency of this litigation.

The balance of harm tips decidedly in favor of the plaintiffs. The expulsion period has expired and all of the named plaintiffs are now indisputably entitled to a free and appropriate education in accordance with the provisions of the Handicapped Act. The entry of a preliminary injunction will

only require the defendants to fulfil their legal obligations mandated by statute. The burdens placed on defendants are those which Congress has placed and which the state has agreed to accept as a condition to obtaining federal funding.

The public interest will also be served by entry of a preliminary injunction. Congress has found that the proper education of handicapped children will be of substantial long range benefit to society:

> " The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence,

thus reducing their dependence on society.

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.

Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions. This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue."

S.Rep.No. 94-168, 94th Cong., 1st Session 9; 1975 U.S. Code Cong. & Ad. News, 1425, 1433.

Although plaintiffs seek relief on behalf of all similarly situated handicapped students within the state, no class has yet been certified. The evidence presented by the plaintiffs failed to show that any handicapped students outside Hendry County or any other handicapped student within Hendry County have been expelled or otherwise deprived of a free and appropriate education. Therefore, at this time the Court finds that preliminary injunctive relief should be limited to the named plaintiffs.

The Court finds that the preliminary injunction should extend to the defendant state officials as well as to local officials. The Handicapped Act imposes on the state educational agency ultimate responsibility for assuring

that the requirements of the act are carried out. 20 U.S.C. §1412(6). State officials have refused to intercede based on their position that the Department of Education lacks authority to intervene in disciplinary matters which are under the authority of local school boards. See Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975). In light of this Court's finding that disciplinary proceedings do not supersede the plaintiffs' rights under the Handicapped Act, the state officials' refusal to fulfil their supervisory responsibilities under the act is unjustified. State officials' contention that a mandatory injunction against them is barred by the Eleventh Amendment, in reliance on Alabama v. Pugh, 438 U.S. 781 (1978), is inapposite. Plaintiffs

have not sued the State of Florida or its agencies; they have sued the various state officials in their individual and official capacities.

The plaintiffs had also contended that defendants have denied them copies of educational records in violation of 45 C.F.R. §121a.562(b)(2). At the hearing on this motion the parties stipulated that plaintiffs may use their own copying machine to copy needed records provided that the copying is done at a reasonable convenience time and that records are not damaged by the copying machine. Therefore, the Court finds it unnecessary to address this issue.

Based upon the foregoing findings and conclusions, the Court finds that

the preliminary injunction entered simultaneously herewith should issue.

ENTERED at Miami, Florida, this 15th day of June, 1979.

CHIEF UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

October Term, 1980

S-1, a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees,

v.

Ralph D. Turlington, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants.

No. 79-2742

D.C. Docket No. 79-8020-Civ-CA

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that Defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 26, 1981